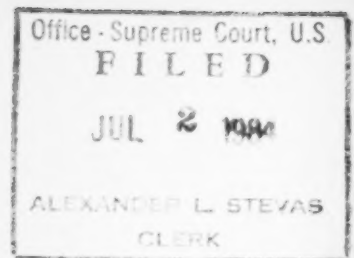


\_\_\_\_\_  
NO. 83-1954  
\_\_\_\_\_



\_\_\_\_\_  
IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1983  
\_\_\_\_\_

THOMAS G. FRAME,

Petitioner,

v.

GREGORY PLESS,

Respondent.

\_\_\_\_\_  
BRIEF OF RESPONDENT GREGORY PLESS  
IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI  
\_\_\_\_\_

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QUESTIONS PRESENTED FOR REVIEW

Were not the district court and court of appeals correct in determining that respondent Pless was denied due process when, before any hearing or other determination of misconduct, he was punished by being confined to a prison isolation cell under conditions far harsher than necessary to guarantee prison security?

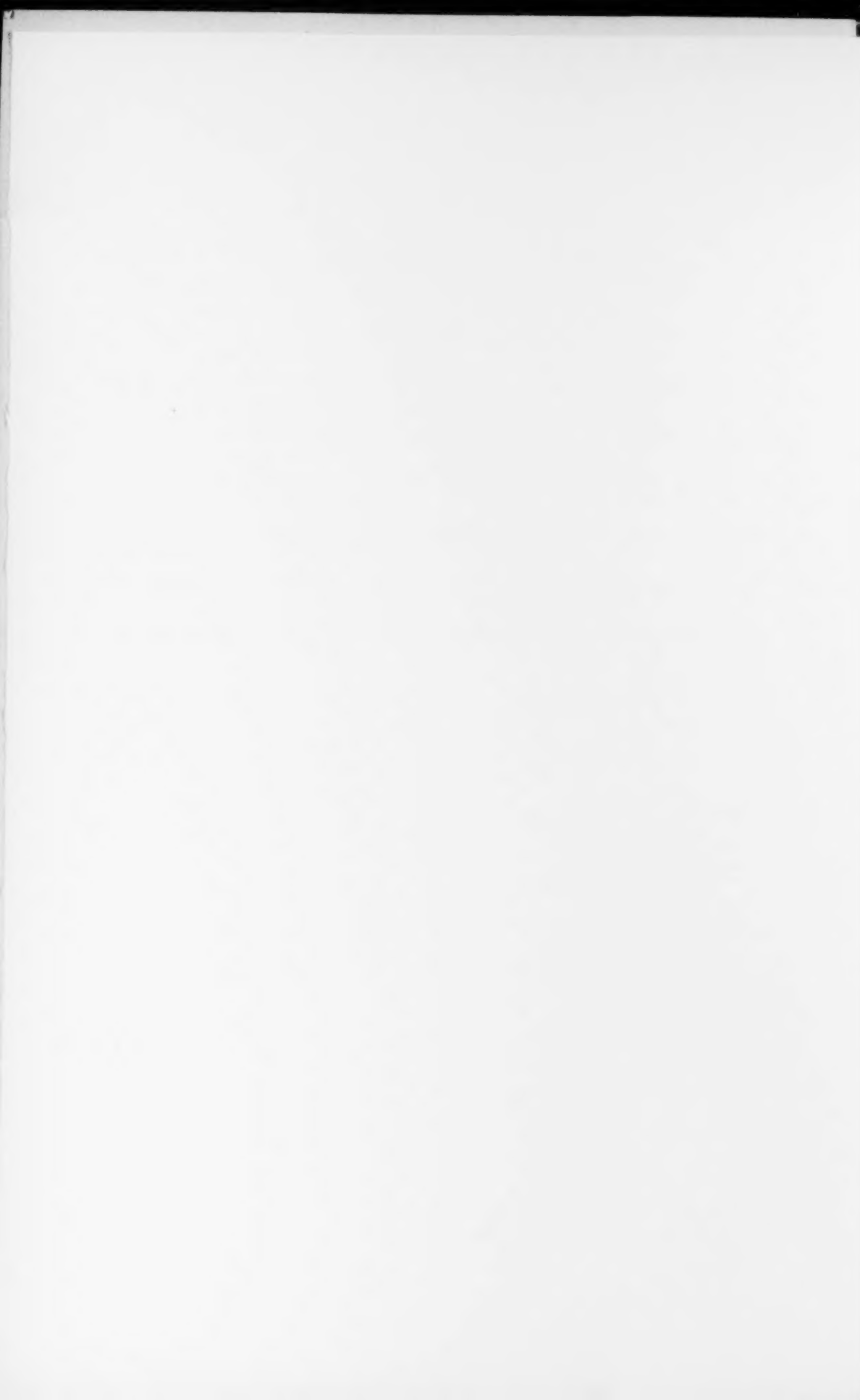
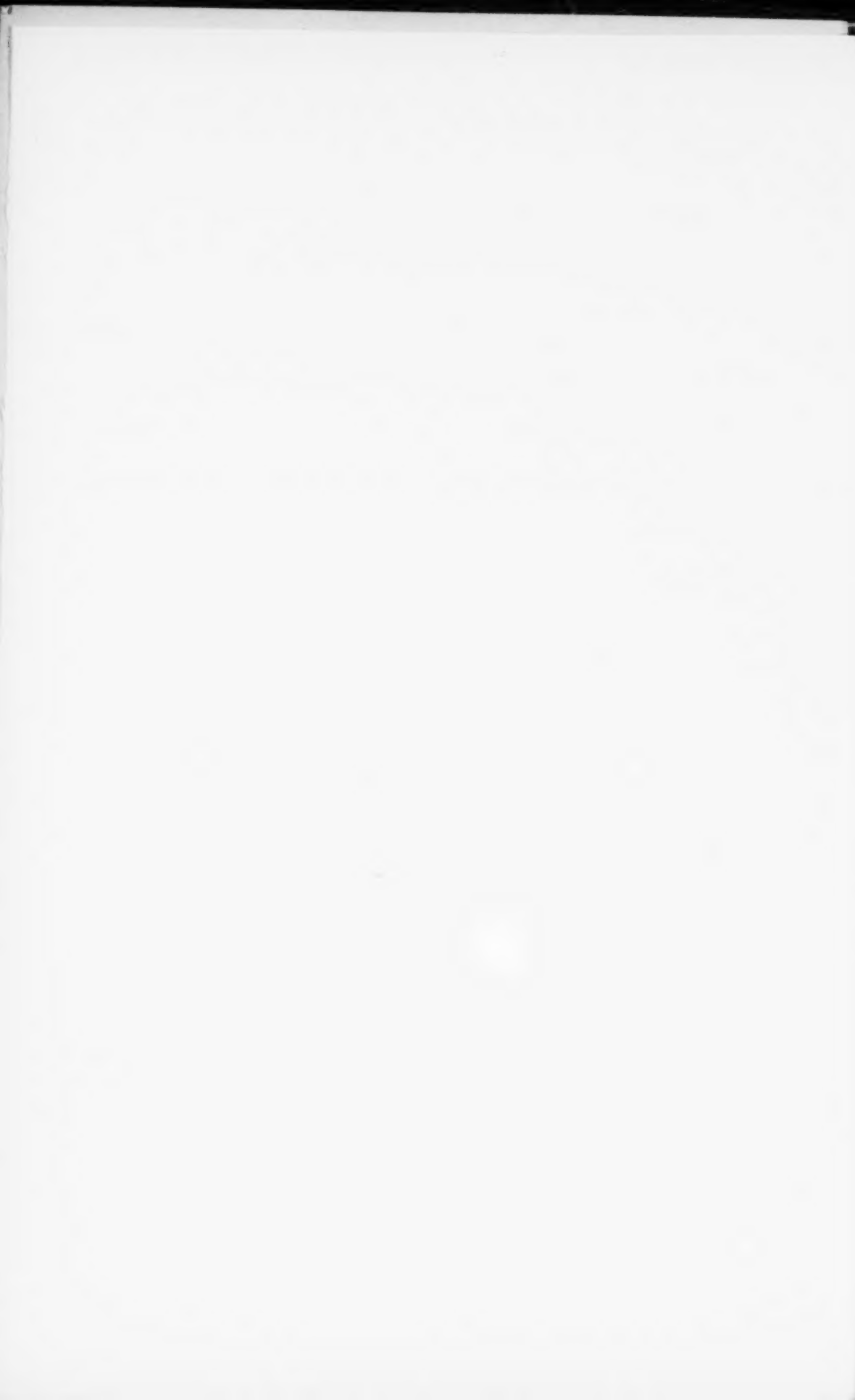


TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED FOR REVIEW.....	i
TABLE OF CONTENTS.....	ii
TABLES OF AUTHORITIES.....	iii
STATEMENT.....	1
ARGUMENT.....	7
I.    FRAME'S PETITION RAISES NO QUESTIONS WHICH DE- SERVE CONSIDERATION BY THIS COURT.....	3
II.   THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT JUDGMENT IN FAVOR OF PLESS BECAUSE PLESS' CONFINEMENT BEFORE HIS DISCIPLINARY BOARD HEARING IN AN ADMINISTRATION CELL DESIGNED TO PUNISH ITS OCCUPANT AND HIS TREATMENT DURING THAT TIME VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.....	11



	<u>Page</u>
III. FRAME'S ARGUMENT THAT PLESS IS NOT ENTITLED TO DAMAGES BECAUSE PLESS CONFESSED AT A POST-PUNISHMENT DISCIPLI- NARY HEARING RAISES AN ISSUE NEITHER BRIEFED NOR ARGUED BELOW AND IGNORES THIS COURT'S PRECEDENT.....	19
CONCLUSION.....	22



TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Bell v. Wolfish</u> , 441 U.S. 520 (1979).....	9, 10, 11, 13
<u>Carey v. Piphus</u> , 435 U.S. 247 (1978).....	21
<u>Codd v. Velger</u> , 429 U.S. 624 (1977).....	21
<u>Hewitt v. Helms</u> , ____ U.S. ____, 103 S.Ct. 864 (1983).....	9, 10, 11
<u>Hughes v. Rowe</u> , 449 U.S. 5 (1980).....	21
<u>United States v. Ortiz</u> , 422 U.S. 891 (1975).....	20
<u>United States v. Santana</u> , 427 U.S. 38 (1976).....	19
 <u>Constitutional Provisions:</u>	
Fourteenth Amendment.....	6, 7, 11





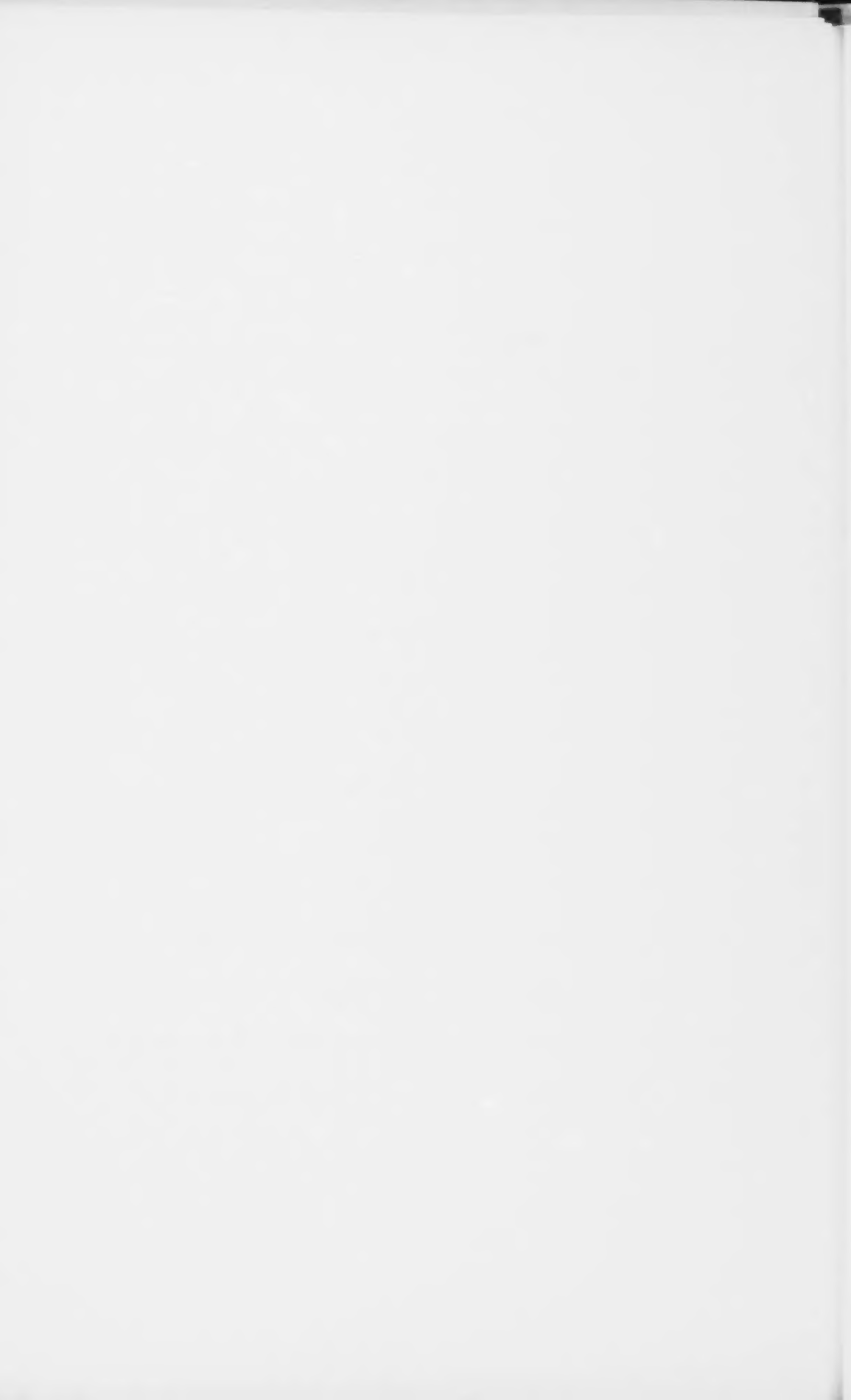
	<u>Page</u>
<u>Statutes and Rules:</u>	
42 U.S.C. § 1983.....	5
Supreme Court Rule 17.....	9
37 Pa. Admin. Code § 95.229(a).....	4
§ 95.231.....	4, 16
§ 95.240(a)(10)(iii).....	5, 16
§ 95.240(a)(10)(v).....	4, 16
§ 95.240(a)(10)(vii).....	5, 16
<u>Other Authorities:</u>	
R. Stern & E. Gressman, <u>Supreme Court Practice</u> 457 (5th ed. 1978).....	20



STATEMENT

By his petition for writ of certiorari, defendant Thomas G. Frame ("Frame") asks this Court review and reverse decisions of the United States Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania.

Respondent Gregory Pless ("Pless") was an inmate at Chester County Prison on July 30, 1981. Petitioner Frame was the Chester County Prison Warden. Following a search of Pless' cell in G block of the prison by correctional officers, Pless became involved in a prison incident and assaulted Officer Donald Hunt. Immediately after the incident, Pless was removed from the general prison population and placed in solitary

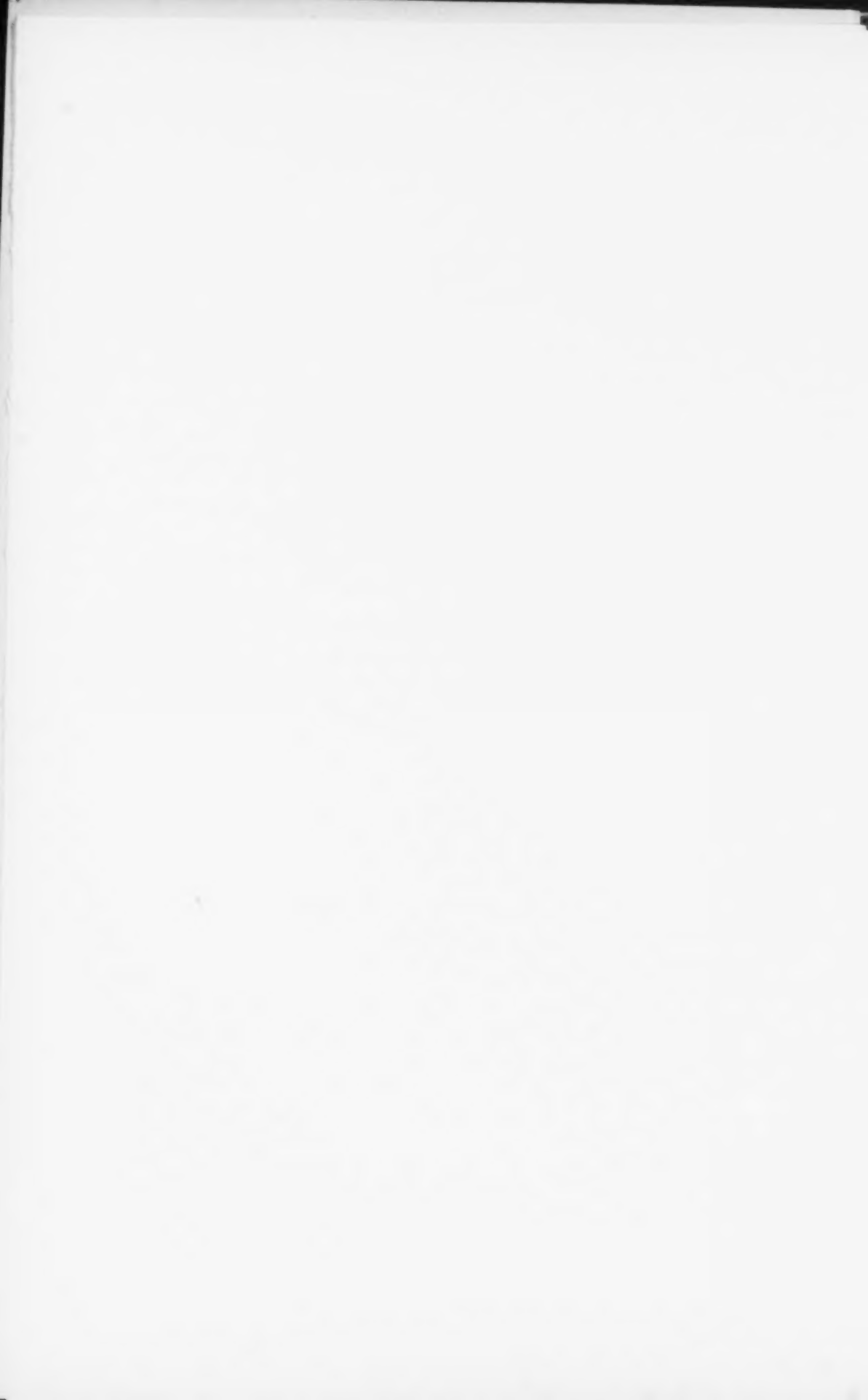


confinement in cell C-22 (30a-31a).<sup>1</sup> Prison officials made no effort at that time to determine Pless' culpability in the incident, or to hear any evidence relating to it. Indeed, Pless did not receive a hearing on the disciplinary charges pending against him until August 4, 1981, five days after the incident (53a-54a).

The conditions of Pless' confinement in cell C-22 were severe. At the time of his initial confinement to cell C-22, Pless' shoes, socks and shirt were taken from him (36a). He was placed in a cell without a bed, mattress, sheets, or blanket (27a-43a). The cell

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1. "a" references are to the Appendix in the United States Court of Appeals for the Third Circuit.



lacked running water, and the only toilet, a so-called "Chinese toilet," consisted of a hole in the floor of the cell (id.). Pless was not regularly provided water in quantities needed for washing, nor was he provided with a toothbrush or other basic hygienic needs (99a). He was not provided adequate drinking water by his guards, and was forced to rely on other inmates who, on several occasions, surreptitiously supplied him with water (98a). During the entire period of Pless' confinement in cell C-22, prison officials permitted him to shower only before court appearances arising from the incidents of July 30, 1981.

From July 30, 1981 to August 4, 1981, Pless was continuously confined in these conditions 24 hours per day without any determination of misconduct. He was not permitted to





leave his isolation cell even for brief exercise periods (44a).

Finally, on August 5, 1981, Pless did obtain a hearing on the charges against him which led to further punishment in the same cell. Eight days thereafter, on August 13, 1981, Pless was moved to a less restrictive environment in cell C-16 of the prison.

The conditions of Pless' confinement in cell C-22 violated numerous state regulations regarding treatment of prisoners. The denial of a mattress, sheets, blankets, pillow, and pillowcase violated 37 Pa. Admin. Code § 95.229(a). The denial of a toothbrush, soap, towels, and water for washing violated 37 Pa. Admin. Code § 95.231 and 37 Pa. Admin. Code § 95.240(a) (10)(v). By taking Pless'



shoes, socks and shirt, prison officials violated 37 Pa. Admin. Code § 95.240(a)(10) (iii). By denying Pless the opportunity to exercise, they violated 37 Pa. Admin § 95.240-(a)(10)(vii) (102a-04a).

Pless filed a civil rights action on October 20, 1981 under 42 U.S.C. § 1983 for, inter alia, Frame's actions in punishing Pless in advance of an administrative hearing. The district court found that the conditions of Pless' confinement in cell C-22 were far more severe than necessary to maintain the inmate's safety or prison security pending disciplinary proceedings against him and that these conditions constituted punishment of Pless for the July 30 incident. Judge Fullam determined as a matter of fact:



[I]t is impossible, on this record, to avoid the conclusion that the treatment accorded plaintiff during the four-day period represented punishment, as opposed to security precautions. (Pet. App. A4).<sup>2</sup>

The district court concluded that Pless was deprived of his liberty interest without due process in violation of the Fourteenth Amendment because Pless was punished from between July 30 to August 4, 1981 prior to any type of hearing. (Pet. App. A7). The court awarded Pless \$100 in damages. (Pet. App. A8).

The United States Court of Appeals for the Third Circuit affirmed the district court judgment that Pless was deprived of liberty without due process in violation of

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2. "Pet. App." refers to the Appendix to the Petition for Writ of Certiorari.



the Fourteenth Amendment. The court recognized that prison officials may confine a prisoner posing a serious threat to prison security to solitary confinement prior to a hearing, but affirmed the district court's conclusion that the conditions of Pless' confinement were "unrelated to the legitimate objectives of preserving security and restoring order, and that the conditions . . . constituted punishment." (Pet. App. A13).

#### ARGUMENT

This Court should deny Frame's petition for writ of certiorari. Petitioner's first question was conclusively answered by the court of appeals, and even if the court of appeals had made the error petitioner





charges, the question is not entitled to this Court's attention. Petitioner's second question was neither argued nor briefed in the court of appeals and thus petitioner should not be able to seek reversal on this ground. Moreover, this question raises no colorable argument that the district court and court of appeals made an error, and even if those courts had made the error, the question does not need to this Court's attention.

I.     FRAME'S PETITION RAISES NO  
          QUESTIONS WHICH DESERVE  
          CONSIDERATION BY THIS COURT.

Although the succeeding sections of this brief answer each of petitioner's questions on the merits, neither of those



questions merits consideration by this Court under the standards of Supreme Court Rule 17.

First, petitioner's arguments present neither issues over which the courts of appeals are in conflict nor important constitutional questions. Instead, his arguments merely challenge the district court and court of appeal's application of this Court's well established two pronged deprivation of liberty without due process test. Hewitt v. Helms, \_\_\_ U.S. \_\_\_, 103 S.Ct. 864 (1983); Bell v. Wolfish, 441 U.S. 520 (1979). This Court has already established the legal principles governing the standards prisoners must meet to show a deprivation of liberty without due process; here petitioner simply asks this Court to reapply those standards.



Second, even if the Court were called upon to determine whether the Third Circuit's order poses legal issues which, in the abstract, were worthy of this Court's attention, those issues were resolved by the court of appeals and the district court fully consistently with this Court's decisions.

As the succeeding sections of this brief indicate, the court of appeals and the district court did not misread Bell v. Wolfish, supra, and Hewitt v. Helms, supra, but even if, *arguendo*, Frame is correct in his view of the opinion below, he has failed to show any "special and important reasons" why this Court should review this case.



- II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT JUDGMENT IN FAVOR OF PLESS BECAUSE PLESS' CONFINEMENT BEFORE HIS DISCIPLINARY BOARD HEARING IN AN ADMINISTRATION CELL DESIGNED TO PUNISH ITS OCCUPANT AND HIS TREATMENT DURING THAT TIME VIOLATED HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

Following the analytical framework set out in Bell v. Wolfish, 441 U.S. 520, 535 (1979) and Hewitt v Helms, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 103 S.Ct. 864, 872 (1983), the district court and court of appeals found that Pless' confinement constituted punishment and violated Pless' Fourteenth Amendment due process guarantees.

This Court acknowledged in Bell the difficulty in formulating standards for determining what constitutes "punishment" which may





not be imposed before hearing. 441 U.S. at 537. The Court established the following framework:

A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate government purpose. Absent a showing or an expressed intent to punish on the part of detention facility officials, that determination generally will turn on 'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purposed assigned [to it].' Thus, if a particular condition or restriction of pre-trial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction of conditioning is not reasonably related to a legitimate goal - if it is arbitrary or purposeless - a court permissibly may infer that the purpose of the governmental action is punishment that



may not constitutionally be inflicted upon the detainees....  
(Citations and footnotes omitted).

Thus, this Court held that the constitutionality of any pretrial detention, and by extension, of any substantial prehearing change in the nature of detention, depended on the relationship between the quality of the detention or change in the detention and the state's legitimate interests. These legitimate interests include securing the detainee's attendance at a trial or hearing and maintaining the security of the correctional institution.

Both the district court and the court of appeals followed the Bell analysis. The district court catalogued the harsh conditions to which Pless was subjected: lack of facilities for sanitation, lack of bed,



mattress, and bed clothing, deprivation of certain clothing including shoes, socks, and shirt. The court then considered in detail the relationship between the state's interest in prison security and those deprivations. (Pet. App. A7-8) Circuit Judge Becker, writing for the unanimous panel, similarly emphasized the unreasonable relationship between the harsh conditions in Pless' cell and the state's interest in prison security. (Pet. App. All-12).

Frame argues in his Petition that the district court and court of appeals were incorrect in finding that these conditions constituted punishment. Frame argues "the Court failed to give prison officials the benefit of deference that is due them" and that the decision to place Pless in the



special cell was made "in the heat of battle." (Pet. 17). Nothing could be further from the truth. The court of appeals and district court of course recognized that it was reasonable for the prison officials to segregate Pless from the rest of the prison population, but those courts correctly did not defer to the prison officials' judgment that Pless should be punished prior to a hearing. Moreover, Pless' continued confinement for four days after the incident and before the hearing reveals that it was not merely the "heat of battle" which led officials to confine Pless to cell C-22.

Frame's second argument, that none of the conditions in cell C-22 was unreasonably related to prison security, (Pet. 17-20) is equally flawed. Frame fails to mention the





district court's critical finding that the conditions violated the Pennsylvania Code's minimum requirements for bedding, personal hygiene, visitation, and discipline and punishment. 33 Pa. Ann. Code §§ 95.231, 95.240-(a)(10)(iii), (v), (vii). The court of appeals and district court thus correctly found that these conditions could not be reasonably related to safety as they violated the state's minimum requirements.

Furthermore, Frame's post hoc justifications for the sub-minimum conditions reveal that these conditions were not reasonably related to prison security. Consider, for example, the absence of any type of mattress in Pless' cell. At the district court, Frame argued that Pless was deprived of bedding material because prison officials



believed that he would start a fire. The court rejected this defense because no prison official ever advanced this as an explanation, nothing in the record suggested that Pless could reasonably be perceived as likely to set fire to his bedding, and Pless was observed every half-hour and was or could have been deprived of a source of combustion. (Pet. App. A7). The district court thus correctly found the absence of any type of mattress was unreasonably related to prison security.

Before this Court, petitioner has changed counsel and revised his justifications for the absence of any bedding materials. The petition now explains "[m]attresses have metal coils that could be fashioned into crude weapons and strips of



fabric can be used to make mischief as well." (Pet. 19). This far-after-the-fact justification is as weak as that belatedly presented to the district court. First, and obviously, the prison could have provided coil-free foam mattresses which could have prevented even the possibility that Pless could have fashioned a weapon. Second, Pless was observed every half-hour and any mischief could have easily been observed. Third, no prison official ever advanced this justification as an explanation until now and there is no evidence in the record that this explanation ever occurred to prison officials before Frame's petition was written.



III. FRAME'S ARGUMENT THAT PLESS  
IS NOT ENTITLED TO DAMAGES  
BECAUSE PLESS CONFESSED AT  
A POST-PUNISHMENT DISCIPLINARY  
HEARING RAISES AN  
ISSUE NEITHER BRIEFED NOR  
ARGUED BELOW AND IGNORES  
THIS COURT'S PRECEDENT.

Frame inappropriately seeks reversal on a ground that the court of appeals had no opportunity to hear. Petitioner argues that a pre-punishment disciplinary hearing was not necessary because Pless admitted his involvement in the incident with Officer Hunt. In keeping with long standing Supreme Court practice, this Court should not consider this argument because it was neither briefed nor argued before either the district court or court of appeals. See, e.g., United States v. Santana, 427 U.S. 38, 41 n.2 (1976);

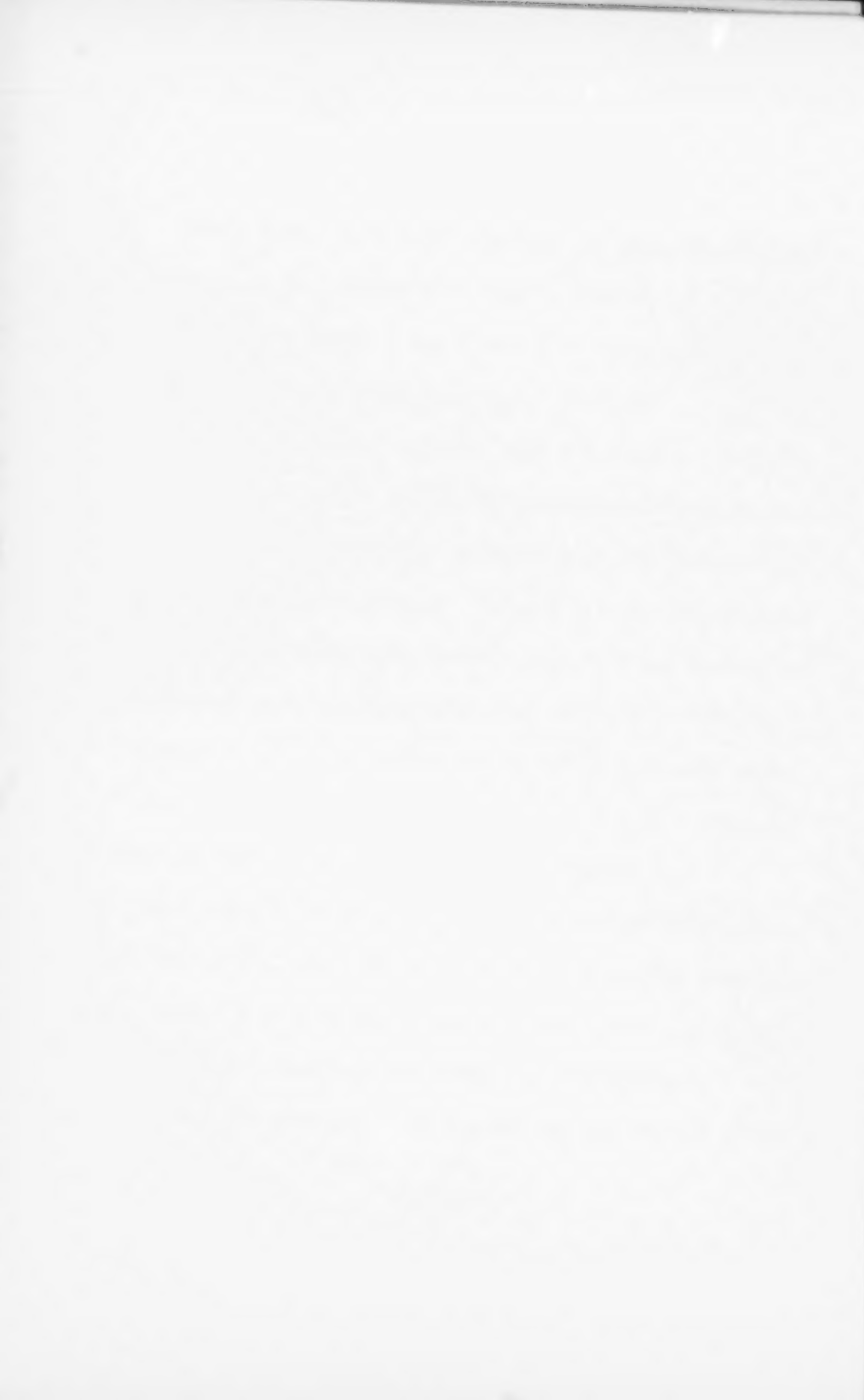




United States v. Ortiz, 422 U.S. 891, 898 (1975); R. Stern and E. Gressman, Supreme Court Practice 457 (5th ed. 1978).

Second, petitioner's argument is plainly false as the record reveals that there was an actual dispute over Pless' involvement in the prison incident during the period prior to Pless' hearing. The record reveals that Pless never admitted his involvement in the incident until his disciplinary hearing five days after his punishment began.

Finally, petitioner ignores recent case law and argues that because Pless admitted his involvement in the incident at the hearing, the hearing was "irrelevant" and that the "Constitution does not require a hearing when there is no material dispute of fact."



(Pet. App. 26). Petitioner relies on a 1977 opinion, Codd v. Velger, 429 U.S. 624 (per curiam) for this proposition. That petitioner would make such an argument clearly evidences petitioner's callous disregard for due process that was already obvious from the underlying facts in this matter. Petitioner's argument ignores this Court's repeated teachings since Codd v. Velger that "... the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions...."

Hughes v. Rowe, 449 U.S. 5, 14 n.12 (1980) (per curiam); Carey v. Piphus, 435 U.S. 247, 266-67 (1978) (citing Codd v. Velger, 429 U.S. at 632 (Stevens, J. dissenting)). Following these cases, the district court and court of appeals were clearly correct in



awarding Pless modest damages because prison officials failed to provide Pless his right to hearing before imposing punishment on him.

CONCLUSION

For all of these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: June 29, 1984